

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

PHARMASTEM THERAPEUTICS,  
INC.,

Plaintiff,

-vs-

CRYO-CELL INTERNATIONAL,  
INC., et al.,

Defendant.

Case No. 8:04-cv-1740-T-30TGW  
9 November 2004  
Tampa, Florida  
8:45 a.m.

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JAMES S. MOODY, JR.,  
UNITED STATES DISTRICT COURT JUDGE

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*(appearances continued on next page)*

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1 (8:45 a.m.) P R O C E E D I N G S

2 THE COURT: Morning.

3 MR. ANDRE: Morning, Your Honor.

4 I first set this hearing because you asked to  
5 change the case management dates, and they seem to be pretty  
6 far out. Now I understand one party wants a preliminary  
7 injunction hearing; and this morning I'm advised that  
8 there's some thought about the MDL taking these cases. So,  
9 what do you want to do with the case here while the MDL is  
10 considering whether or not to take it?

11 MR. ANDRE: Your Honor, Paul Andre. I represent  
12 the plaintiff, PharmaStem Therapeutics.

13 We'd like to continue the case here at this point.  
14 And what's going on at this point is that the defendants  
15 have actually filed a petition with the MDL to consolidate  
16 the discovery aspects of the case; and at this point in the  
17 case, there is a -- there is a compromise to push it out a  
18 little further past the -- the guidelines the Court imposed;  
19 but what we're more concerned about at this point is the  
20 multiplicity of what's going on in the cases and, thus, the  
21 preliminary injunction.

22 We're asking the Court to enjoin the defendant and  
23 counterclaim plaintiff in this case from having the same  
24 exact counterclaims in two different courts. So, pending  
25 the multi-district decision, which could be -- I'm not sure

1 exactly when that will come down, to be quite frank. I know  
2 our -- I think the briefing is due in late November. So, I  
3 don't know how long that panel will take to actually make a  
4 decision. But at this point, we would like to have this  
5 aspect of the Court's -- of this case, the multiplicity of  
6 it, determined at this level.

7 THE COURT: Okay. If you're concerned about  
8 multiplicity, aren't you then in agreement with the MDL  
9 taking it for discovery purposes?

10 MR. ANDRE: No, Your Honor. The multiplicity is  
11 not so much in that there is -- we have different defendants  
12 in different jurisdictions. In this particular case, we  
13 have the exact same defendant asserting counterclaims in  
14 this case, which it was -- and to the extent those  
15 counterclaims survive, which it was required to do -- and to  
16 its credit, it did file the counterclaims that it filed  
17 based on the facts of the case we brought forward.

18 THE COURT: Didn't you have your hearing in the  
19 other court yesterday?

20 MR. ANDRE: It was last week, and it was a -- a  
21 hearing on a preliminary injunction that was filed by the  
22 plaintiffs in that case, which would be the defendants in  
23 this case. They were attempting to get an injunction  
24 against PharmaStem, the plaintiff in this case, from certain  
25 activity.

1 But the -- the decision as to whether this  
2 defendant could be joined in that preliminary injunction has  
3 not been decided. They filed a notice of joinder. We  
4 opposed it. They filed their papers. The Court in Delaware  
5 has not decided.

6 But what's happened here is that the -- the  
7 defendants in this case, after they filed the counterclaims  
8 and we filed a motion to dismiss those counterclaims, they  
9 then went to Delaware and filed the exact same counterclaims  
10 based on the exact same facts.

11 Now, our position is that we like that  
12 multiplicity of the same parties in different courts. Now,  
13 the fact that the patent case involving the same patents  
14 against different defendants are pending in different  
15 jurisdictions around the country, we don't think that is  
16 multiplicity. There's going to be different discovery  
17 required and different theories of the case, depending on  
18 who --

19 THE COURT: Except somebody's got to construe the  
20 patent, and you wouldn't want there to be separate  
21 constructions of the patent, would you?

22 MR. ANDRE: Well, I think that the construction of  
23 the patents will be -- obviously there is a chance that the  
24 interpretation of the claims may vary slightly, but I don't  
25 think that's an issue that we're obviously too concerned

1 with, because this claim is pretty straightforward, in our  
2 opinion. So, we think that the construction, however it  
3 comes down, will not vary greatly in any construction  
4 imaginations. It's just something that we filed in  
5 different jurisdictions obviously because of personal  
6 jurisdiction on the defendants. We've filed cases in five  
7 different district courts around the country with the same  
8 two patents, and the jurisdictional aspect of the defendants  
9 requires us to file it in those various jurisdictions.

10 THE COURT: Unless they consent to jurisdiction  
11 somewhere else.

12 MR. ANDRE: At this point, they could consent to  
13 jurisdiction elsewhere, that's correct, Your Honor.

14 THE COURT: Sounds like at least one defendant is  
15 trying to get into the case somewhere else.

16 MR. ANDRE: That's exactly right.

17 THE COURT: So, they have no problem with  
18 jurisdiction; right?

19 MR. ANDRE: At this point. At this point. They  
20 do obviously want to have the case transferred for reasons  
21 of their own. We sued each one of these defendants in their  
22 back yards in courts that are most convenient to them, and  
23 why they want to transfer to an out-of-state court is  
24 obviously up to -- that's their decision.

25 We have a right as a plaintiff to pick the forum

1 that we think is best suited for us, and we've done so. And  
2 nothing that the defendants have raised has indicated what  
3 we've done is improper. For example, Cryo-Cell is located  
4 in Clearwater, Florida; and the defendant, Dr. Zafran, is  
5 located, I think, in the Tampa Bay area as well. So, suing  
6 them in this court is a proper jurisdiction to sue them in.  
7 And the MDL, for discovery purposes, taking the case, if  
8 that is the case, wherever it happened to transfer -- maybe  
9 it will transfer to this court or California or wherever the  
10 panel decides, if it does it decide to consolidate --

11 THE COURT: Well, they generally pick the oldest  
12 case; and isn't that in Delaware --

13 MR. ANDRE: No, it's not, Your Honor.

14 THE COURT: -- or Pennsylvania? Where is it?

15 MR. ANDRE: Well, what it -- two years ago there  
16 was a case filed in Delaware regarding -- we'll call them  
17 patents one and two, and that case filed in Delaware went to  
18 trial, and a jury verdict resulted favorably for my client.  
19 And then after the jury verdict came down, during post-trial  
20 motions, we filed another round of lawsuits with patents  
21 three and four, two different patents, issued just before  
22 the trial in the first case. So, you have two very distinct  
23 cases here.

24 Now, they are related patents, meaning from the  
25 same patent family; but they're different claims, different

1 defendants, and different legal theories of patent  
2 infringement that are being pursued. So, the first filed  
3 case was actually filed, I believe, July 28th in this court,  
4 as well as courts in California and in Boston and in  
5 Pennsylvania.

6 THE COURT: But they are completely separate  
7 patents? You're saying patent one and two aren't involved  
8 in this case?

9 MR. ANDRE: Not at all, Your Honor.

10 THE COURT: What's involved in the case in which  
11 the defendant's trying to intervene in some other  
12 jurisdiction?

13 MR. ANDRE: Those are antitrust claims.

14 THE COURT: Which patents? Three and four or --

15 MR. ANDRE: Three and four. Three, four, and then  
16 actually a fifth patent, five. They are alleging antitrust  
17 counterclaims involving proposed agreements entered into  
18 with various healthcare providers regarding patents three,  
19 four, and five. So, patents one and two, I think it's safe  
20 to say, are separate and distinct. That case will be going  
21 to the appellate court very shortly, I imagine. The parties  
22 have filed 54(b) motions and 1292 motions as well to get  
23 that case to the appellate court, for it -- the judge in  
24 Delaware has ordered a retrial on -- for purposes of patent  
25 number one. He set aside the finding of infringement on



1 patent number two on September 15th.

2 THE COURT: The case in which they are trying to  
3 intervene, was that filed before my case was filed?

4 MR. ANDRE: It was not, Your Honor.

5 What happened in Boston was that we filed a case  
6 against one of the defendants in the -- in Boston, and  
7 they -- they asked for an extension of time to answer our  
8 complaint, and we gave them the extension of time; and  
9 during that time, they filed a claim in Delaware, and -- for  
10 the antitrust claims regarding the patents we have sued on  
11 in Boston. And that's the reason we went forward with a  
12 temporary restraining order, because they filed for a  
13 complaint and preliminary injunction at that point. We have  
14 not even answered the complaint. We have moved to dismiss  
15 it.

16 The -- the case in Florida, in your court, these  
17 parties just recently joined and amended the complaint in  
18 Delaware to try to join in that case as well. So, the first  
19 filed cases regarding patents three and four were filed in  
20 this court and various other courts.

21 THE COURT: All right. Well, why is it necessary  
22 to put the trial of this case off to the summer of 2007, is  
23 it?

24 MR. ANDRE: I believe that's correct, Your Honor.  
25 What we had -- I'll let Mr. Rodgers discuss that. We had

1 proposed the, I think, 22-month trial; and the defendants  
2 asked for a much longer time. And I believe the December  
3 date was a compromise just to try to reach a compromise. We  
4 had actually proposed a much earlier trial date; but just in  
5 the spirit of cooperation, we tried to split the baby, as it  
6 were, to accommodate the defendants, because they said the  
7 complexity of the case required them to need more time.

8 So, I'll let Mr. Rodgers address that.

9 THE COURT: All right.

10 MR. KETCHEY: Judge, I'd like to introduce -- I'm  
11 Charlie Ketchey. I'd like to introduce Jim Rodgers, who is  
12 going to handle this on behalf of the defendants.

13 MR. RODGERS: Good morning, Your Honor.

14 Your Honor's first question was what should we do  
15 with this case. Our suggestion, respectfully, would be that  
16 we put it on hold for several months while we see what the  
17 judicial panel on multi-district litigation decides to do  
18 with it.

19 We would expect that this matter would come on to  
20 the panel's January calendar and be heard at that time and  
21 that by shortly thereafter we would have a decision as to  
22 how -- whether or not these matters would be coordinated for  
23 pretrial proceedings in Delaware, as we have asked, or some  
24 other disposition.

25 I would respectfully disagree with a couple of

1 things Mr. Andre has said about the relationship between the  
2 patents and the claims that are asserted in all these  
3 various cases. First of all, as he did point out, there is  
4 a retrial scheduled on the 681 patent. It hasn't been  
5 calendared, but it's pursuant to Judge Sleet's post-trial  
6 order.

7 That patent involves a levitation and a claim,  
8 which is precisely the same limitation that's found in what  
9 Mr. Andre refers to as patents three and four, which are the  
10 patents they assert here. These patents are so closely  
11 related that it makes little sense to consider them  
12 separately.

13 Your Honor pointed out quite correctly the true  
14 risk of multiplicity here is of five different constructions  
15 of the same patents in different districts and/or of  
16 inconsistent rulings on pretrial motions that present  
17 similar fact patterns. I would -- as to the scheduling  
18 issue, we propose the relatively long schedule for a couple  
19 of reasons. One point is that, depending on how the issues  
20 shake out with regard to where these claims should be  
21 litigated, we may very well want to amend our counterclaims  
22 here to assert the antitrust claim that's asserted in  
23 Delaware; and that antitrust claim, by the way, relates not  
24 just to patents three and four but to a pattern of conduct  
25 that relates to all five of PharmaStem's patents. And that

1 would put it on as a Track 3 case under this Court's  
2 procedures.

3 As to why it's going to take some time, again, the  
4 fact is that, again, although this is one case with two  
5 defendants in Florida, it is clearly related to what's going  
6 on in these other districts in these other cases involving  
7 the other defendants. And so, that's one of the reasons why  
8 it perhaps will take some time for this case to work its way  
9 through.

10 Another factor in the back of our minds is that we  
11 expect that there will be petitions to re-examine these  
12 patents filed in the patent office in the very near future,  
13 which is another matter which could affect the way these  
14 cases ought to progress.

15 And so, for all of those reasons, we think that  
16 the lengthy time schedule is appropriate, but, more  
17 importantly, that the right thing to do at this time would  
18 be to defer all further action in this case until the panel  
19 has had a chance to make a ruling. I think the things that  
20 would actually be delayed would be the initial disclosures  
21 and to defer any ruling on a motion to dismiss the  
22 counterclaims.

23 I think it's instructive, Your Honor, to note that  
24 in early October when PharmaStem moved to dismiss our  
25 counterclaims here, they said very simply these claims

1 should have been, could have been brought in Delaware. Two  
2 weeks later, they moved for an injunction here and said  
3 these claims must have been brought -- the claims that are  
4 asserted in Delaware must have been brought here. So, we  
5 have kind of an inconsistent position that's been asserted.

6 Thank you.

7 THE COURT: Are you willing to consent to  
8 jurisdiction in Delaware?

9 MR. RODGERS: Oh, yes, Your Honor. We're a  
10 Delaware corporation. And so, that's never been an issue.  
11 We were a defendant in the original Delaware case, and  
12 PharmaStem chose to file on the first two patents.

13 THE COURT: And Delaware is where Judge Sleet is?

14 MR. RODGERS: That's correct, Your Honor; and just  
15 as a clarification, Dr. Zafran, the other defendant in the  
16 case here, doesn't even live in this district. He's from  
17 Broward County.

18 THE COURT: Who is Dr. Zafran?

19 MR. RODGERS: He is the additional defendant that  
20 was joined in this case, Your Honor; and in each of these  
21 cases that PharmaStem has filed fairly recently, they have  
22 sued one of the cord blood banks that were defendants in the  
23 original Delaware case, and they added doctors or other  
24 healthcare providers because of a theory -- we're not quite  
25 sure what the theory is at this point, but of some theory of

1 infringement; and Dr. Zafran was sued in this case.

2 THE COURT: All right.

3 MR. RODGERS: Thank you.

4 MR. ANDRE: Your Honor, I would just like to  
5 address one issue. The -- we received the defendant's brief  
6 in this matter regarding the motion for the injunction last  
7 night, and there is -- Mr. Rodgers has brought it up again  
8 regarding the statements we made in motions to dismiss that  
9 these claims or these issues were brought in the Delaware  
10 case. We're talking about the first Delaware case that was  
11 filed several years ago, three years ago now.

12 In that particular case, the -- the letters that  
13 they complain of in this case was brought to that Court's  
14 attention, and they sought a remedy in that case, and they  
15 received the remedy that they sought. So, that was the  
16 basis for dismissal, but they've already sought their  
17 judicial remedy in the Delaware one case. We're not saying  
18 that it should have been ripe to sustain a new set of claims  
19 in an entirely new case, in the Delaware two case. So, I  
20 think there's a little bit of slight of hand going on here  
21 that -- as far as what remedies they have available to them.  
22 They sought it in the first Delaware case. Now they have  
23 filed a second Delaware case. And we say those claims in  
24 the second case are the exact same claims they filed here.

25 I mean, it's something that -- one thing they

1 don't explain in their brief and they haven't explained here  
2 today, they have counterclaims they filed; and the  
3 counterclaims in this case are the ones for the interference  
4 with contractual relations, the Laminak 43,8 claims, the  
5 deception or unfair trade practices, and patent misuse.  
6 Those exact same claims based on the exact same facts have  
7 now also been filed in another federal court.

8 And all we're asking for, our only remedy, other  
9 than fighting it out in this court and that court -- and  
10 even if the case does get transferred to the multi-district  
11 litigation aspect, that's just for the pretrial discovery.  
12 We still have to try them in this court, and we have to try  
13 them in Delaware.

14 We'll have those claims pending in this court and  
15 in the Delaware court for trial; and having that  
16 multiplicity, our only remedy to solve that is to have this  
17 Court enjoin them from pursuing the exact same claims in two  
18 different courts.

19 THE COURT: Well, it's not your only remedy.  
20 Judge Sleet could deny the motion to intervene; right?

21 MR. ANDRE: That's true. It's either have this  
22 Court to enjoin them from moving forward -- because that's  
23 what the case law and the precedence has dictated, that this  
24 Court has the equitable powers to enjoin them, because this  
25 is the first-filed case, et cetera --

1 THE COURT: Or to raise these claims before or  
2 should have raised them before in prior litigation.  
3 Judge Sleet would know a lot more about that than I would,  
4 wouldn't he?

5 MR. ANDRE: The -- the claims in the Delaware one  
6 action?

7 THE COURT: You're saying that their counterclaims  
8 that they filed in this case either were or should have been  
9 raised in the Delaware action -- the prior Delaware action?  
10 I think that's what you just said.

11 MR. ANDRE: No. In our motion to dismiss, we  
12 stated that the cause of action that they set forward -- it  
13 was an argument we made in the motion to dismiss, saying  
14 that the -- the judicial remedy had already been sought and  
15 obtained in the first Delaware action. That's correct.

16 THE COURT: So, it's res judicata.

17 MR. ANDRE: It's a res judicata theory of the  
18 case.

19 THE COURT: It would be a lot easier for  
20 Judge Sleet to figure it out than it would be for me to  
21 figure out.

22 MR. ANDRE: In theory, yes, that's correct,  
23 Your Honor.

24 THE COURT: Am I -- am I intuiting correctly that  
25 for some reason they liked Judge Sleet and for some reason



1 you prefer to have some other judge or even some judge  
2 that's stupid on patents down here in Florida?

3 MR. ANDRE: Your Honor, I'm -- I think your  
4 intuition is right, they would like to have Judge Sleet.  
5 Judge Sleet has provided the defendants in this case with a  
6 favorable ruling on a -- the remedy they sought earlier  
7 regarding the preliminary injunction against my client.  
8 They filed a -- a motion with the Court regarding a June 2nd  
9 letter that my client sent out to obstetricians informing  
10 them about the previous trial. They moved for preliminary  
11 injunction, and Judge Sleet granted the preliminary  
12 injunction, I think, the day after -- maybe two days after  
13 it was filed before we even had a chance to oppose the  
14 preliminary injunction.

15 So, that fact pattern is something that I believe  
16 the defendants -- they believe Judge Sleet is obviously in  
17 tune with their arguments.

18 So, it is something that -- that is the argument  
19 we made, that they sought that remedy and they got the  
20 injunction that they wanted regarding the June 2nd letter.

21 Now, as far as the other basis of their claims and  
22 their counterclaims regarding what they call the amnesty  
23 agreement and other aspects, you know, they can bring those  
24 in this court and try to have them sustained if they believe  
25 there's any legal cause of action; and this Court is as

1 familiar with that cause of action as -- well, Judge Sleet  
2 is educated about it now because we had the hearing there  
3 last week, but those are new causes of action. They were  
4 not part of the original case in Delaware.

5           So, our belief is that we would like to pursue our  
6 claims in the courts that we choose and the rights of the  
7 plaintiff to choose the forum as long as it's for all legal  
8 purposes. It is a right that we would like to retain to  
9 enforce our patents the way we see fit. And we're a small  
10 company. When we go to Delaware and you see 20 attorneys  
11 sitting on the other side of them and there's usually two of  
12 us, it's a bit formidable for us.

13           So, our -- the theory of our remedy, I guess, or  
14 our reasons for coming to this court, other than the fact  
15 that we disagree with the Court's assessment regarding the  
16 Court's knowledge of patent law probably -- but it is our  
17 choice of forum, and it doesn't inconvenience them. It's in  
18 their backyard.

19           So, with respect to the argument that they make  
20 that the plaintiff in this case has said that they should go  
21 to Delaware, we don't think they should file claims in  
22 Delaware. We think if they file counterclaims, they should  
23 be in this court.

24           What we said in our motion to dismiss was they've  
25 already sought their remedy in Delaware in one particular

1 aspect with the June 2nd letter. They can't go in and  
2 double-dip and get claims on the exact same facts that  
3 they've already, you know, obtained the remedy from in a  
4 previous case.

5 To the extent they filed a new case in Delaware,  
6 that's where we have the problems, the Delaware two case,  
7 because there the exact same counterclaims are in place than  
8 they are in this court.

9 THE COURT: Okay.

10 MR. ANDRE: Thank you, Your Honor.

11 THE COURT: I'll approve the case management dates  
12 sought by the parties. I'm going to stay this case for 120  
13 days to see what MDL does with it. If nothing is resolved  
14 in the 120 days, you can file a motion asking for a  
15 preliminary injunction hearing. I'll give you the hearing,  
16 and then I'll decide what to do with it.

17 I can tell you upfront that my first reaction is  
18 it seems appropriate that all these related cases across the  
19 country ought to be resolved by one court, whether it's  
20 Judge Sleet or some other court. It's neither here nor  
21 there to me, but it doesn't make -- it's not for good  
22 judicial economy to have five different courts trying to  
23 construe the same patents. So, I'll be glad to give you the  
24 preliminary injunction hearing.

25 I can tell you where I'll be coming from and where

1 you will need to direct your persuasion. It would seem  
2 appropriate to me that some court take the lead and construe  
3 these patents; and then if we have separate trials on what  
4 the separate parties are doing about them, that's fine. But  
5 to me that would seem a strong reason why the MDL would have  
6 all the pretrial discovery done in a consolidated fashion,  
7 even to the point of having the patents construed through  
8 the Martina hearing.

9 And the little bit I know about patents is at  
10 least I do know that the federal district is now considering  
11 changing the standards that you're supposed to use in trying  
12 to construe patents; and we don't even know what that is  
13 right now. Is that right?

14 MR. ANDRE: I believe the federal circuit is  
15 looking at it -- it's a big case -- that's correct, Your  
16 Honor; and the Supreme Court is considering that aspect.


17 THE COURT: Okay. All right. Well, if you still  
18 have these burning issues pending after 120 days, let me  
19 know, and I'll consider them.

20 MR. ANDRE: Thank you, Your Honor.

21 THE COURT: All right. Thank you.

22 (This matter was adjourned at 9:10 a.m.)

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24  
25

1 CERTIFICATE OR REPORTER  
23 STATE OF FLORIDA )  
4 CIRCUIT OF HILLSBOROUGH )  
56 I, SHERRILL LYNN JACKSON, Official Court Reporter  
7 for United States District Court, Middle District of  
8 Florida, Tampa Division,9 DO HEREBY CERTIFY that I was authorized to and  
10 did report in shorthand the proceedings and evidence in the  
11 above-styled cause, as stated in the caption hereto, and  
12 that the foregoing pages numbered 1 to 21, inclusive,  
13 constitute a true and correct transcription of my shorthand  
14 report of said proceedings and evidence.15 Dated this 25th day of November, 2004.  
1617   
18 Sherrill Lynn Jackson, RPR  
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